

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's finding that claimant is limited to two scheduled injuries. Claimant argues that the evidence in the record shows that she also suffered an injury and a 5 percent impairment to the body as a whole for her neck. In the event the Board finds that claimant suffered injury to her body as a whole, she argues the evidence shows she suffered a 16.67 percent task loss and has a 100 percent wage loss, which computes to a work disability of 58.335 percent.

Respondent argues that the greater weight of the credible evidence establishes that the ALJ's Award should be affirmed in its entirety. If the Board finds that claimant suffered a whole body injury, respondent argues that she should be denied work disability because it is against public policy and further prejudices the respondent to award a work disability to an individual who has chosen not to seek employment.

The issues for the Board's review are:

(1) Is claimant's impairment limited to two scheduled injuries, or did she prove that she suffered an injury to her cervical spine, which would move her impairment into the body as a whole?

(2) If claimant suffered impairment to the body as a whole, is she entitled to a work disability?

FINDINGS OF FACT

Claimant worked for respondent as a cashier for about a year when she began experiencing problems with her shoulders and neck. She attributed the pain to the repetitious lifting involved in her work as a cashier. On October 22, 2007, she told her supervisor, Robert Masilionis, that she had a work-related injury to her left shoulder and her left and right elbows. She asked for medical treatment and was taken to Tallgrass Immediate Care. She was diagnosed with left shoulder strain and bilateral elbow pain and was prescribed anti-inflammatory medication and muscle relaxers. She was released to return to work the next day with restrictions of no lifting, pushing or pulling over 25 pounds. She was also to be allowed breaks every 2 to 3 hours and was told to avoid repetitive motion if possible.

Mr. Masilionis testified that claimant was able to work as a cashier with her restrictions. She was instructed to ask for help if a customer came through her register with heavy items. Claimant also covered for coworkers as a greeter at times. Claimant was terminated by respondent for reasons having nothing to do with her injury. Her last day worked at respondent was February 11, 2008. Mr. Masilionis testified that had

claimant not been terminated, respondent would have continued to accommodate her restrictions.

Claimant testified that she has pain all the time, every day. The pain goes up her neck and she gets tight muscles. She uses a TENS unit and takes muscle relaxers. She said her condition has worsened since she was terminated by respondent. But she said she did not suffer any new injuries while working at any of the jobs she worked after her termination by respondent. She testified that the pain in her left upper extremity was a level 7 on a scale of 0 to 10. She has pain in her right upper extremity, but it is only a level 3 on a scale of 0 to 10. Her neck is tight all the time and she rates her neck pain as a level 7 to 8 on a 0 to 10 scale.

Dr. Joseph Sankoorikal, who is board certified in physical medicine and rehabilitation, first saw claimant on May 4, 2009. She was initially sent to him by respondent for an independent medical examination (IME), after which he was authorized to treat her. He testified that most of her complaints were of pain in her neck and shoulder, more to the left side.

Dr. Sankoorikal said he first thought claimant's problem was musculoligamentous. She had undergone some physical therapy, so he suggested she have trigger point injections. Dr. Sankoorikal gave claimant four injections, all mostly to the left side of the upper trapezius and scapular area. The injections were not in the cervical area. She continued to have physical therapy. Dr. Sankoorikal said that in his office visits with claimant, she complained of pain every time except the one visit after he gave her the trigger point injections. At that visit, claimant thought the pain was getting better. But the next visit after that she was again complaining of pain.

On January 26, 2010, Dr. Sankoorikal examined her for an impairment rating. In examining claimant, Dr. Sankoorikal did a standard neuromuscular evaluation, in which he found no impairment of any nerves, reflexes, sensation or strength. He found objective findings in the presence of trigger points. In regard to claimant's neck, Dr. Sankoorikal found that sensation was normal, muscle strength was normal, range of motion in the shoulder and neck was normal. She had a few trigger points in the upper trapezius. His diagnosis was myofascial pain syndrome that was not responding to conservative treatment.

Based on the *AMA Guides*,¹ Dr. Sankoorikal found claimant was in DRE Cervicothoracic Category II and rated her as having a 5 percent permanent partial impairment of the whole body based on her continued subjective complaints of pain and

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

his objective findings of trigger points. He did not believe she needed any restrictions. He believed from the beginning that claimant should get back to gainful employment.

Dr. Sankoorikal said he saw claimant during and after her employment at respondent, and her situation seemed to be essentially the same in both periods. He would not apportion any of his impairment rating to any potential aggravation due to claimant's subsequent employment.

Dr. Peter Bieri, a board certified independent medical examiner, evaluated claimant on March 9, 2010, at the request of claimant's attorney. Claimant gave him a history of having repetitive injuries to her upper extremities. She described onset of pain involving both shoulders and the left elbow. She also said she had pain radiating into the left side of her neck. Claimant had undergone physical therapy for her neck, but no other significant treatment. She also had undergone physical therapy for her shoulders.

In examining claimant's cervical spine region, Dr. Bieri found no visible or palpable muscle spasm at rest. Claimant had slight tenderness to palpation on the left. Active range of motion of the cervical spine was full and unrestricted. Dr. Bieri testified he did not examine claimant's neck in order to rate her for that but focused on her upper extremities. He said he examined claimant's cervical spine region in a cursory fashion.

Examination of claimant's left shoulder revealed moderate tenderness to palpation at the AC joint radiating into the deltoid. Strength was slightly decreased, primarily with flexion, abduction and external rotation. Examination of the elbows revealed moderate tenderness to palpation and compression. Active range of motion was full and unrestricted.

Dr. Bieri diagnosed claimant with impingement syndrome of the left shoulder and bilateral epicondylitis. He opined that the injuries resulted from repetitive use during employment. Using the *AMA Guides*, Dr. Bieri rated claimant as having a 7 percent left upper extremity impairment for range of motion deficits of the left shoulder, a 3 percent left upper extremity impairment for pain and weakness, and a 5 percent left upper extremity impairment for residuals of epicondylitis, for a combined left upper extremity impairment of 15 percent. Relative to the right upper extremity, Dr. Bieri rated claimant as having a 5 percent upper extremity impairment for residuals of epicondylitis.

Dr. Bieri recommended that shoulder level and overhead use of claimant's upper extremities should be performed no more than occasionally to frequently. Repetitive gripping and grasping should be limited by pain tolerance. Dr. Bieri reviewed a task list prepared by Dick Santner. Of the 54 items on the list, he opined that claimant would be unable to perform 9, for a task loss of 16.67 percent.

Dr. Bieri opined that no further specific treatment was anticipated for claimant. Although claimant has been released by Dr. Sankoorikal and Dr. Bieri believes she needs

no further treatment, claimant believes she is still in need of treatment because she is in so much pain.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on June 22, 2010, at the request of the ALJ. Claimant told him she was injured at respondent repetitiously doing heavy lifting and working as a cashier. She told Dr. Prostic that the area that bothered her most was the left side of her neck. She had difficulties looking up, down, or turning her head from side to side. She reported pain in her left shoulder in the deltoid muscle area. She had increased difficulty reaching her left hand above shoulder level or behind her back. She had shoulder trouble pushing, pulling, reaching and lifting. She had pain at the outside aspect of each elbow.

In examining claimant, Dr. Prostic found her cervical spine had normal alignment without tenderness. Range of motion of the neck was full except for left tilt, which was restricted 10 to 15 degrees. She reported pain at the extremes of all motions of her neck. Claimant had mild tenderness at the origin of the extensor supinator muscle mass from the right elbow. She had mild to moderate weakness of supination of the forearm. Grip strength on the right was 34 kilograms. At the left, claimant's shoulder lacked 25 degrees of internal rotation and 10 degrees of external rotation. Impingement signs were negative. There was some instability of the scapula when Dr. Prostic checked her for muscle strength, but there was no definite winging of the scapula. Claimant had discomfort with external rotation. She had tenderness of the extensor supinator origin from the lateral of the condyle. She had mild to moderate weakness of supination. Grip strength on the left was 15 kilograms.

Dr. Prostic believed that claimant had lateral epicondylitis of both elbows and interior instability of her left shoulder. He rated her as having a 5 percent permanent partial impairment of the right upper extremity and a 20 percent permanent partial impairment of the left upper extremity. He opined that claimant's neck difficulties were secondary to the shoulder rather than being a separate problem. Dr. Prostic concluded that the permanent impairment claimant has in each of her upper extremities was caused by the repetitive trauma she had while working for respondent.

Dr. Prostic acknowledged that claimant had consistently complained of neck pain. But he did not consider her as being in DRE Cervicothoracic Category II. He believes claimant's neck symptoms are due to faulty use of her shoulder muscles because of the anterior instability. Although Dr. Sankoorikal treated claimant's neck with trigger point injections, at the time Dr. Prostic saw her, she had no cervical spine disease. He found that claimant had some decreased range of motion in her cervical spine, which he said could be a reflection of a facet joint problem at a disc or a response to a problem in her shoulder.

Dick Santner, a vocational rehabilitation counselor, met with claimant on June 29, 2010. Claimant was not working at the time he saw him. Together, they assembled a list

showing 54 tasks she performed in the 15-year period before her work-related injury. During the last 15 years, claimant has been employed in 34 various positions.

Claimant told Mr. Santner that she was a high school graduate. She completed CNA training in 1997. She then went to Washburn University for two semesters. After that, she completed a 10-month cosmetology program. Then she attended Bryan Career College, intending to become a computer network specialist, but she dropped out after two semesters. In 2004, she attended Kaw Area Vocational Technical School to renew her CNA certification, and she also became certified as a medication aide. In 2006 she obtained certification as a home health aide. Post-injury, she has been enrolled in an online program through Kaplan University and had completed two semesters of a human services program. She anticipated completing an Associates Degree in January 2011.

Claimant did not tell Mr. Santner that she was totally disabled and not likely to work again. With claimant's educational background, Mr. Santner believes she has the ability to return to substantial and gainful employment.

Michelle Sprecker, a vocational rehabilitation counselor, met with claimant on June 14, 2010, at the request of respondent's attorney. She was unable to complete her evaluation of claimant on that day, and spoke with claimant on August 16 and 17 in order to get information concerning her past employments. Claimant was able to identify 39 employers in the 15 years before her work related injury. Ms. Sprecker prepared a list of 65 work tasks claimant performed in the 15-year period before her accident at respondent.

Claimant was unemployed at the time of the evaluation by Ms. Sprecker. Claimant told Ms. Sprecker that she wanted to focus her energies on her education now rather than take another job from which she would be fired. She wants a job that will allow her to use her brain rather than her body. Ms. Sprecker believed that claimant would be realistically employable in the Topeka job market based on her current physical ability.

Claimant told Ms. Sprecker that she has had five jobs since her termination by respondent and before starting her online classes with Kaplan University. Claimant told Ms. Sprecker she worked for Alorica from April 14 to June 2, 2008. She worked a full 40-hour week earning \$9.25 per hour. Claimant worked at Assisted Services from December 17, 2008, to March 20, 2009, where she worked 30-35 hours a week and earned \$8.30 per hour. Claimant worked as a cashier at Dollar General from July 1 to August 13, 2009. She worked 20 to 25 hours per week and earned \$7.25 per hour. She worked at Cracker Barrel from August 17 to September 10, 2009. She worked 30 to 35 hours per week and earned \$2.25 per hour plus tips of \$7 to \$10 per hour. She last worked at Macy's as a sales clerk from November 9 to December 4, 2009. She worked 20 to 25 hours per week and earned \$7.25 per hour.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments. . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.S.A. 44-510e states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall

not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,² the Kansas Supreme Court stated:

K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.

ANALYSIS

There is no dispute that claimant suffered a compensable injury. The issue before the Board is the nature and extent of claimant's resulting disability. Claimant argues that she has permanent impairments to both shoulders and her neck. As a result, she is entitled to an award of work disability. The ALJ was persuaded by the opinions of the neutral, court-appointed medical examiner, Dr. Prostic, to find claimant has a 5 percent permanent partial impairment of her right upper extremity at the shoulder level and a 20 percent impairment of her left upper extremity at the shoulder level. Respondent contends that the ALJ's Award should be affirmed. The Board agrees.

Claimant received medical treatment for symptoms primarily in her bilateral elbows, shoulders and the area between her shoulders and her neck. Although painful, claimant was able to return to work with respondent as a cashier and performed other jobs after she was terminated by respondent. Her permanent restrictions do not prevent her from working and claimant is not contending that she is permanently and totally disabled. The presumption of permanent total disability created by claimant's bilateral scheduled injuries has been overcome.³

² *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 3, 214 P.3d 676 (2009).

³ See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

Three experts testified concerning the nature and extent of claimant's injuries and resulting impairments of function. Dr. Sankoorikal found no impairment of any nerves, reflexes, sensation or strength. In regards to her neck, he found her sensation was normal, muscle strength was normal and her range of motion was normal. He found trigger points in her upper trapezius and scapular area and diagnosed her with myofascial pain syndrome. He rated claimant's impairment as 5 percent to the body as a whole. He did not think claimant was in need of any permanent work restrictions.

Dr. Bieri examined claimant and found no muscle spasm but some slight tenderness on the left side of claimant's neck. Her range of motion was full. He did not rate claimant's neck and acknowledged that his examination of claimant's cervical spine area was cursory. His diagnosis was impingement syndrome of the left shoulder and bilateral epicondylitis of the elbows. He rated claimant's left upper extremity at 15 percent and her right as 5 percent. In addition, Dr. Bieri recommended restrictions to claimant's use of her upper extremities.

Dr. Prostic was the last of the physicians to examine claimant. Thus, his findings are the most recent. He found no tenderness in claimant's neck and her range of motion was full except for some restriction of her left tilt. Claimant reported pain at the extremes of all motions of her neck. He diagnosed lateral epicondylitis of both elbows and anterior instability of claimant's left shoulder. He rated the right upper extremity at 5 percent and the left at 20 percent. He did not rate claimant's cervical area because he believed her neck symptoms were caused by her shoulder problems rather than the neck being a separate problem. He did not find claimant had any cervical spine disease.

Like the ALJ in this case, the Board is persuaded that claimant's injuries are to her upper extremities and do not involve the cervical spine. Her permanent impairments of function are likewise limited to the upper extremities and do not include the neck. The Board adopts the percentages of functional impairment as opined by Dr. Prostic.

CONCLUSION

Claimant is entitled to an award of permanent partial disability compensation for a 5 percent functional impairment of her right upper extremity at the level of the shoulder and a 20 percent impairment of function of the left upper extremity at the shoulder level.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 9, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge